United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2576

To be argued by
JEREMY G. EPSTEIN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2576

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY ASTONE,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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JOHN D. GORDAN, III,
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Preliminary Statement

Anthony Astone appeals from a sentence imposed upon a judgment of conviction entered on November 27, 1974, in the United States District Court for the Southern District of New York following Astone's plea of guilty before the Honorable Edmund L. Palmieri, United States District Judge.

Statement of Facts

Indictment 74 Cr. 375, filed April 10, 1974, charged Astone in eight counts of income tax evasion in violation of Title 26, United States Code, Section 7201. Counts One through Four alleged that Astone, in his capacity as president of Newburgh Moving & Storage, Inc., Newburgh, New York, had attempted to evade a portion of that corporation's taxes for the fiscal years 1967, 1968, 1969 and 1970.

Counts Five through Eight charged that Astone had attempted to evade a portion of the personal income tax owed by himself and his wife for the years 1967, 1968, 1969 and 1970.

Astone entered a plea of not guilty to all counts at his arraignment on April 22, 1974.

On October 1, 1974, Astone withdrew his previous plea and pleaded guilty to Count 4 of the indictment, which alleged that he had filed a corporate tax return declaring taxable income of $20,637.42, on which a tax of $4,540.23 was paid, although the actual taxable income was $53,882.54 and the tax due thereon $20,331.80.

On November 27, 1974, Judge Palmieri sentenced Astone to four months imprisonment and a committed fine of $2,500.* The remaining seven counts of the indictment were thereupon dismissed on Astone's motion. Judge Palmieri ordered him to surrender on December 9, 1974.

On December 4, 1974, Judge Palmieri denied what he deemed a motion to stay Astone's surrender pending appeal of his sentence but postponed the surrender until December 10, 1974, to permit a bail application to be made to this Court. Bail was granted by this Court pending appeal, and Astone is presently at liberty.

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* The maximum penalties under 26 U.S.C. § 7201 are five years imprisonment and/or a fine of $10,000.

ARGUMENT

The sentence imposed by the District Court was in all respects proper.

The law in this Circuit is settled that

> ". . . absent reliance on improper considerations, see *United States* v. *Mitchell,* 392 F.2d 214, 217 (2d Cir. 1968) (Kaufman, *J.,* concurring), or materially incorrect information, see *United States* v. *Malcolm,* 432 F.2d 809, 816 (2d Cir. 1970), a sentence within statutory limits is not reviewable. See, *e.g. United States* v. *Brown,* [479 F.2d 1170, 1172 (2d Cir. 1973)]; *United States* v. *Dzialak,* 441 F.2d 212, 218 (2d Cir.), *cert. denied,* 404 U.S. 883 (1971)." *United States* v. *Velazquez,* 482 F.2d 139, 142 (2d Cir. 1973).

Accord, Dorszynski v. *United States,* — U.S. —, 94 S. Ct. 3042 (1974); *United States* v. *Tucker,* 404 U.S. 443 (1972); *Gore* v. *United States,* 357 U.S. 386, 393 (1958); *United States* v. *Hendrix,* Dkt. No. 74-1603 (2d Cir., October 15, 1974), slip op. at 5807. In an attempt to secure appellate review of his sentence, Astone claims that the pre-sentence report improperly included his arrest record, did not reflect his "exemplary life" (Br. at 8),* and improperly referred to the Government's estimate of the extent of Astone's tax evasion ". . . without affording Astone the opportunity to rebut this amount" (Br. at 14). Astone also claims that Judge Palmieri improperly viewed his guilty plea as a mitigating factor (Br. at 15-17). All of this is buttressed by such "factual" assertions not in the record as Astone's version of a conversation in a corridor of the Court House (Br. at 13) and an account of his sub-

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* References to "Br." are to Astone's brief. References to "A." are to Astone's appendix.

jective intentions surrounding his guilty plea (Br. at 13-14). None of these claims was presented to Judge Palmieri either at sentencing or by Rule 35 motion.

His first claim is that the pre-sentence report should not have included his arrest record but only his convictions. Rule 32(c) specifically provides that the pre-sentence report include a defendant's "criminal record". A criminal record includes arrests; if the Rule meant only that convictions should be included, it would have been easy enough to make that clear, and Astone cites no authority for his claim that only convictions should be included. Moreover, a sentencing judge may properly consider unproven criminal activity of the defendant, *Williams* v. *New York,* 337 U.S. 241 (1949), *United States* v. *Needles,* 472 F.2d 652, 654-655 (2d Cir. 1973), *United States* v. *Doyle,* 348 F.2d 715, 721 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965), and even criminal conduct of which the defendant has been acquitted. *United States* v. *Sweig,* 454 F.2d 181, 183-184 (2d Cir. 1972). In *United States* v. *Doyle, supra,* 348 F.2d at 721, this Court, speaking through Judge Friendly, held:

> ". . . Of necessity, much of the information garnered by the probation officer will be hearsay and will doubtless be discounted accordingly, but the very object of the process is scope and the defendant is always guarded by the statutory maximum. To argue that the presumption of innocence is affronted by considering unproved criminal activity is as implausible as taking the double jeopardy clause to bar reference to past convictions. See *Williams* v. *State of Oklahoma,* 358 U.S. 576. Indeed, Doyle's protests are almost ludicrous as applied to the present facts. The Government was ready to proceed on all counts; simply by adhering to his former plea Doyle could have had a public trial, where he could dispute all the Government's charges. . . . It was he, on the ad-

> vice of many highly sophisticated counsel, who avoided airing of the facts by a guilty plea."

In any event, it is clear from the sentencing proceedings that Judge Palmieri attached little weight to Astone's prior criminal record.*

Astone's claim that Judge Palmieri gave insufficient weight to the positive side of his character is untenable. The letters submitted to the Court before sentencing (A-25-A-38) and Astone's counsel's remarks at sentencing (A-13-A-19) fully set out the favorable aspects of Astone's background. The extent of Judge Palmieri's leniency is shown by his imposition of a sentence one-quarter as long as the one the Probation Office had recommended (A-22).

The argument that the amount of Astone's tax liability was presented to the Court "without affording Astone an opportunity to rebut this amount" (Br. at 14) is wholly without basis. At both plea and sentence Astone disputed the Internal Revenue Service's estimates of his tax liability (A-8-A-9, A-14-A-15), even though Astone admitted his guilt of tax evasion and offered no contrary liability figure. Judge Palmieri did not adopt the Internal Revenue Service figures, as Astone intimates (Br. at 4). Rather, he merely stated what was charged in the count to which Astone pleaded guilty (A-20). Astone's rights were fully observed. *United States* v. *Needles, supra,* 472 F.2d at 658.

Finally, Astone makes the remarkable claim that the trial judge improperly accorded him leniency because he

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* It should be noted, moreover, that the record contains nothing that suggests that Judge Palmieri did rely on Astone's arrests. He adverted only to Astone's previous convictions—an eminently proper consideration, as Astone now concedes—adding that "[t]hese convictions are for the most part, rather old convictions . . ." (A-21).

pleaded guilty. Whatever may be the claim of one who has been penalized for going to trial, *Hess* v. *United States,* 496 F.2d 936 (8th Cir. 1974), there is nothing improper in according leniency to a defendant who has pleaded guilty and shown contrition. *United States* v. *Floyd,* 496 F.2d 982, 989 (2d Cir. 1974); *United States* v. *Lehman,* 468 F.2d 93, 109-110 (7th Cir.), *cert. denied,* 409 U.S. 907 (1972). *Gollaher* v. *United States,* 419 F.2d 520, 530 (9th Cir.), *cert. denied,* 396 U.S. 960 (1969). *Cf. United States* v. *Hendrix, supra,* slip op. at 5809-5810. Even if this were not so, how Astone could have been hurt by being treated with leniency, whether accorded him on an improper basis or not, is nowhere explained.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Jeremy G. Epstein, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9th day of January, 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Greenblatt & Neuman, P.C.
369 Fullerton Ave.
Newburgh, New York 12550

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Jeremy G. Epstein

Sworn to before me this
9th day of January 1975
Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975